Manjeet Singh a/l Santokh Singh v CPA Australia Ltd & Ors

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO S-22–644 OF 2010
HUE SIEW KHENG J
13 FEBRUARY 2012

Civil Procedure — Pleadings — Issue not pleaded — Plaintiff sought declaratory orders by way of application when pleadings made no mention of same — Whether plaintiff could be allowed to expand scope of relief not covered by pleadings — Whether plaintiff failed to show pre-existing cause of action to be entitled to injunction — Whether mere right to obtain injunction insufficient — Whether plaintiff could seek final orders by way of application when matter yet to be tried

The plaintiff was a member of the first defendant by virtue of which he applied for and obtained membership with the second defendant ('the institute'). When the institute came to know the plaintiff's membership with the first defendant had been forfeited ('the forfeiture') as a result of certain disciplinary action, it informed him that he was required to provide an explanation regarding the forfeiture to the institute's Investigation Committee ('IC') to enable it to decide whether the matter should be referred to the Disciplinary Committee ('DC'). Although the plaintiff submitted his written explanation about the forfeiture he was advised to attend a hearing before the IC to explain the matter further if necessary. Before the hearing could take place the plaintiff served on the institute a writ and statement of claim with a caution that since legal proceedings had been commenced, the institute's in-house adjudication of any complaint regarding the forfeiture ('the complaint') would be sub-judice. The IC nevertheless proceeded with its hearing in the plaintiff's absence and decided to refer the matter to the DC. The plaintiff then filed an application (encl 22) seeking declarations that the IC's hearing, its referral of the complaint to the DC and any hearing by the DC of the complaint were sub-judice and null and void. Enclosure 22 also sought to injunct the institute and the DC from taking any further action on the complaint while an injunction was also sought to restrain 'persons associated with the complaint' from discussing or giving any evidence with regard to the complaint. The institute said encl 22 should be dismissed as the plaintiff's pleadings made no mention of the reliefs sought in the application and that the plaintiff was not entitled to seek final reliefs by way of the application.

Held, dismissing encl 22 with costs:

(1) Whilst the plaintiff had sought an injunction to restrain the institute and/or its agents from proceeding to hear the complaint, the two

declaratory orders sought for in encl 22 had not been prayed for in the statement of claim. The plaintiff could not be allowed to expand the scope of relief not covered by his original pleadings (see para 12).

(2) The plaintiff could not seek an injunction against the institute as it was trite law that there must be a pre-existing cause of action, as a right to obtain an interlocutory injunction was not a cause of action and could not stand on its own (see para 13).

(3) The plaintiff had not cited any specific provision of the rules of procedure or authority that entitled him to claim for the declaratory orders which were decidedly final in nature when the matter had yet to be set down for trial (see para 16).

[Bahasa Malaysia summary

Plaintif adalah ahli defendan pertama di mana melaluinya dia memohon untuk dan memperolehi keahlian dengan defendan kedua ('institut'). Apabila institut mengetahui yang keahlian plaintif dengan defendan pertama telah dilucuthakkan (pelucuthakan) akibat tindakan tatatertib tertentu, ia memberitahu plaintif yang dia dikehendaki memberikan penjelasan berkaitan pelucuthakan tersebut kepada Jawatankuasa Siasatan institut ('JS') untuk membolehkan ia untuk memutuskan sama ada perkara tersebut patut dirujuk kepada Jawatankuasa Disiplin ('JD'). Walaupun plaintif memberikan penjelasan bertulisnya mengenai pelucuthakan tersebut dia dinasihatkan untuk menghadiri pendengaran di hadapan JS untuk menjelaskan perkara tersebut dengan lebih lanjut jika perlu. Sebelum pendengaran tersebut dijalankan plaintif menyerahkan writ dan penyata tuntutan ke atas institut dengan amaran bahawa memandangkan prosiding undang-undang telah bermula, penghakiman dalaman institut mengenai apa-apa aduan berkaitan pelucuthakan tersebut ('aduan') akan menjadi sub-judice. Walau bagaimanapun JS meneruskan dengan pendengarannnya dalam ketidakhadiran plaintif dan memutuskan untuk merujuk perkara tersebut kepada JD. Plaintif kemudiannya memfailkan permohonan (lampiran 22) memohon perisytiharan bahawa pendengaran JS, rujukannya mengenai aduan kepada JD dan apa-apa pendengaran oleh JD terhadap aduan adalah sub judice dan terbatal dan tak sah. Lampiran 22 juga memohon untuk menghalang institut daripada mengambil apa-apa tindakan lanjut ke atas aduan sementara injunksi juga dipohon untuk menghalang 'persons associated with the complaint' daripada berbincang atau memberi apa-apa keterangan berkaitan aduan tersebut. Institut menyatakan lampiran 22 patut ditolak memandangkan pliding plaintif tidak menyatakan apa-apa mengenai relief yang dipohon di dalam permohonan dan bahawa plaintif tidak berhak untuk memohon relief akhir melalui permohonan tersebut.

Diputuskan, menolak lampiran 22 dengan kos:

(1) Sementara plaintif memohon injunksi untuk menghalang institut

A dan/atau ejen-ejennya daripada prosiding untuk mendengar aduan, kedua-dua perintah perisytiharan yang dipohon dalam lampiran 22 tidak dipohon di dalam penyata tuntutan. Plaintif tidak dibenarkan untuk melanjutkan skop relief yang tidak dipohon melalui pliding asalnya (lihat perenggan 12).

B (2) Plaintif tidak dapat memohon injunksi terhadap institut kerana ia adalah undang-undang nyata bahawa mesti terdapat kausa tindakan sedia ada, memandangkan hak untuk memperolehi injunksi interlokutari bukan kausa tindakan dan tidak dapat bertindak dengan sendirinya (lihat perenggan 13).

C (3) Plaintif tidak merujuk apa-apa peruntukan spesifik mengenai kaedah-kaedah prosedur atau kuasa yang memberikan dia hak untuk menuntut perintah-perintah perisytiharan yang mana bersifat muktamad apabila perkara tersebut belum lagi ditetapkan untuk

D perbicaraan (lihat perenggan 16).]

Notes

For cases on issue not pleaded, see 2(3) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 6485–6494.

E

Cases referred to

Harrison-Broadley and Others v Smith [1964] 1 All ER 867, CA (refd)
Lee Ah Chor v Southern Bank Bhd [1991] 1 MLJ 428, SC (refd)
Nishimatsu Construction Co Ltd v Kecom Sdn Bhd [2009] 2 MLJ 404; [2008] 6

F CLJ 149, CA (refd)

Legislation referred to

Accountants Act 1967
Malaysian Institute of Accountants (Disciplinary) Rules 2002 r 3(3)

G Rules of the High Court 1980 O 18 r 15(1)

Venu Nair (Paul Cheah & Associates) for the plaintiff.
John Mathew (Lee Ong & Kandiah) for the defendants.

Hue Siew Kheng J:

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[1] By encl 22, the plaintiff applied for the following orders:

(a) A declaration that the hearing and determination of the said Complaint by the Investigation Committee (hereinafter referred to as 'the IC') on the

I 4th day of August 2010 and thereafter, the further hearing, determination and reference of the said Complaint by the IC to the Disciplinary Committee (hereinafter referred to as 'the DC') on the 24th day of August 2010, were and are, at all material times, *sub-judice* and in contempt of court and therefore, illegal, null and void and unenforceable;

(b) A declaration that the proposed hearing and/or inquiry by the DC on the 6th of July 2011 and/or any adjourned hearings and/or inquiries in respect of the Formal Complaint And The Notice Of Complaint dated the 2nd day of October 2006 lodged and issued against the plaintiff respectively, by the 2nd defendant (hereinafter collectively referred to as 'the said complaint'), are *sub-judice*;

(c) An injunction restraining the 2nd defendant by its servants and/or agents from pursuing the said Complaint with the DC;

(d) An injunction restraining the DC from pursuing the said Complaint;

(e) An injunction restraining all persons associated with the said Complaint including the Complainants and their witnesses from discussing and/or proffering evidence and/or witness statements at the hearing fixed by the DC, now or hereafter at any adjourned hearings and/or inquiries until final disposal of this matter and/or further order of this Honourable Court.

BACKGROUND FACTS

[2] The plaintiff was a member of the first defendant. By virtue of his membership in the first defendant, the plaintiff applied for and obtained membership in 1998 with the second defendant (the institute).

[3] As a result of disciplinary action taken against him in 2004, for breach of ethical behavior, by the Disciplinary Committee of the first defendant, his membership was forfeited on 27 September 2004. The plaintiff appealed against the forfeiture but his appeal was rejected being filed out of time. He was duly notified by the first defendant of the said rejection. The institute was informed by the Jabatan Akauntan Negara Malaysia by a letter dated 6 September 2006 that the plaintiff had forfeited his membership with the first defendant as a result of the disciplinary proceedings taken against him.

[4] In view of this matter being brought to the knowledge of the institute, the council of the institute instructed the president of the institute to lodge a complaint against the plaintiff with the registrar of the institute in accordance with r 3(3) of the Malaysian Institute of Accountants (Disciplinary) Rules 2002.

[5] The registrar of the institute then issued a notice of complaint dated 2 October 2006 to the plaintiff pursuant to the complaint lodged and sought the plaintiff's explanation for its Investigation Committee to determine whether to refer the matter to the Disciplinary Committee (DC). The plaintiff gave a written explanation to the registrar vide his letter dated 29 November 2006.

[6] In his letter of explanation the plaintiff had contended, inter alia, that the disciplinary proceedings taken by the first defendant was a nullity and that he intended to initiate legal proceedings to set aside the decision of the first defendant. The plaintiff however, did not take any action to set aside the decision of the first defendant, despite a considerable lapse of time (of seven years). The Investigation Committee of the institute then notified the plaintiff that an investigation hearing would be held on 12 April 2010 and the plaintiff was offered the opportunity to be heard and give his explanation to the notice of complaint.

[7] The hearing before the Investigation Committee was adjourned twice at the instance of the plaintiff. A third date was scheduled for 4 August 2010. Two days prior to 4 August 2010 the institute was served with an unsealed copy of the amended writ of summons and amended statement of claim. The institute was informed that an adjudication of the complaint would be sub-judice in view of the commencement of the legal proceedings.

[8] Nonetheless, the Investigation Committee proceeded with the hearing of the notice of complaint on 4 August 2010. The plaintiff having absented himself, the Investigation Committee then decided to refer the matter to the Disciplinary Committee of the institute. The plaintiff was duly informed by letter dated 26 August 2010. The sealed copy of the amended writ and statement of claim was served on the institute on 3 September 2010.

ENCLOSURE 22

[9] Enclosure 22 was filed on 30 June 2011. In essence, encl 22 seeks two declarations and two injunctions against the institute and/or its Disciplinary Committee and a third injunction against 'persons associated' with the complaint from pursuing the complaint.

PRELIMINARY OBJECTIONS

[10] The second defendant has raised the following preliminary issues:

(a) the amended writ of summons and the amended statement of claim do not contain the two declaratory reliefs presently sought in encl 22. Neither do, the amended writ of summons and the amended statement of claim seek any injunction against the Disciplinary Committee of the institute or 'person associated' with the complaint;

(b) encl 22 also purports to seek final reliefs against the institute and/or the Disciplinary Committee established under the Accountants Act 1967; and

(c) the plaintiff has also not proffered the usual undertaking as to damages in the event the action herein fails. This is a trite requirement in applications for injunctive relief.

FINDINGS OF COURT

[11] In respect of the first issue, the plaintiff in his amended writ of summons and statement of claim had asked for the following reliefs:

(a) A declaration that the suspension of the Malaysian Divisional Council was, and is, at all material times, illegal, null and void and unenforceable.

(b) A declaration that by a reason of the suspension of the said Malaysian Divisional Council, the plaintiff was also likewise and inevitably suspended in his capacity as a member of the said Divisional Council.

(c) By reason of prayer (b) above, a declaration that the suspension of the plaintiff, in his capacity as a member of the said Malaysian Divisional Council, was, and is, at all material times, illegal, null and void and unenforceable.

(d) An order that the plaintiffs aforesaid suspension be revoked and that the plaintiff be reinstated as a member of the said Malaysian Divisional Council.

(e) A declaration that all acts done and actions taken by the 1st defendant and/or its agents, subsequent to and in furtherance of the aforesaid suspension of the said Malaysian Divisional Council and the suspension of the plaintiff in his capacity as a member of the said Malaysian Divisional Council, were and are, at all material times, illegal null and void and unenforceable.

(f) A declaration that all acts done and actions taken by the 1st defendant and/or its agent prior to, leading to and culminating in the Purported Inquiry conducted on the 26th and 27th day of July 2004, were, and are, at all material times, from inception, illegal, null and void and unenforceable.

(g) A declaration that Charges Numbers 1, 2 and 4 framed against the plaintiff, were, and are, at all material times, illegal, null and void and unenforceable.

(h) A declaration that the Purported Malaysian Disciplinary Committee purportedly appointed by the Board of the 1st defendant, was, and is, at all material times, a body which is illegal, null and void and unenforceable.

(i) A declaration that the Purported Inquiry conducted on the said 26th and 27th day of July 2004, was, and is, at all material times, illegal, null and void and unenforceable.

(j) By reason of prayer (i) above, a declaration that all the evidence adduced

A and led at the Purported Inquiry was, and is, at all material times, illegal, null and void and unenforceable and therefore, inadmissible.

(k) A declaration that the decision and/or finding of the Purported Malaysian Disciplinary Committee, that the plaintiff was guilty of Charges Numbers 1, 2 and 4 and that accordingly, he be disciplined for breach of Ethical Behaviour, was, and is, at all material times, illegal, null and void and unenforceable.

(l) A declaration that the 1st defendant's forfeiture of the plaintiff's membership with the 1st defendant on the 27th day of September 2004, was and is, at all material times, illegal, null and void and unenforceable.

(m) An order that the forfeiture of the plaintiff's membership in the 1st defendant be revoked and that the plaintiff's membership in the 1st defendant be reinstated.

(n) An injunction to restrain the 2nd defendant, and/or its servants and agents from proceeding to hear the said Complaint, until the final disposal of the action filed herein and/or until further order of this Honourable Court.

[12] It is clear that whilst the plaintiff had sought an injunction to restrain the institute and/or its agents from proceeding to hear the complaint in para (n), the two declaratory orders sought in this application have not been prayed for in the statement of claim. I concur with the submission of learned counsel for the institute that the plaintiff should not be allowed to expand the scope of relief not covered by his original pleadings (see *Lee Ah Chor v Southern Bank Bhd* [1991] 1 MLJ 428).

[13] Given that no relief or declaration is sought against the institute, the plaintiff cannot seek for an injunction against the institute (as seen in para (n)) as it is trite law that there must be a pre-existing cause of action as a right to obtain an interlocutory injunction is not a cause of action and cannot stand on its own: see *Nishimatsu Construction Co Ltd v Kecom Sdn Bhd* [2009] 2 MLJ 404; [2008] 6 CLJ 149.

[14] The plaintiff purports to rely on *Harrison-Broadley and Others v Smith* [1964] 1 All ER 867 where a declaration was made, though not specifically pleaded. As noted in the commentary on p 906 of the *White Book*:

> A declaration may, it seems, be made under O.15 r.16, supra, though not specifically asked for in terms (see *Hulton v Hulton* [1916] 2 KB 642; [1917] 1 KB 813; *Harrison-Broadley v Smith* [1964] 1 WLR 456; [1964] 1 All ER 867, CA, but see doubts expressed by Pearson, LJ, in the same case, and by Harman LJ, *Biss v Smallburgh R.D.C.* [1965] Ch. 335, at p.361; [1964] 2 All ER p. 554.

[15] I am of the view that the plaintiff's reliance on *Harrison-Broadley* cannot stand in view of the express provision of O 18 r 15(1) of the RHC which provides:

> 15(1) A Statement of Claim must state specifically the relief or remedy which the plaintiff claims; but costs need not be specifically claimed.

[16] As for the second issue raised, the plaintiff has not cited any specific provision of the rules of procedure or authority that entitles him to claim for the declaratory orders at this stage as the declaratory orders are decidedly final in nature. This matter has yet to be set down for trial.

[17] In view of the foregoing, I find there is merit in the preliminary objections raised. Accordingly encl 22 is dismissed with costs of RM5,000.

Enclosure 22 dismissed with costs.

Reported by Ashok Kumar